

Neutral Citation Number: [2013] EWHC 396 (QB)

Case No: 1RL00741

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY**

Cardiff Civil Justice Centre
2 Park Street
Cardiff
28 February 2013

B e f o r e :

**His Honour Judge Keyser QC
sitting as a Judge of the High Court**

Between:

BRIAN DODSON	Claimant
- and -	
ENVIRONMENT AGENCY	Defendant

THE CLAIMANT appeared in person
LOUIS BROWNE (instructed by The Solicitor to Environment Agency Wales) for
the Defendant

Hearing dates: 25, 26 and 28 February 2013

HTML VERSION OF JUDGMENT

H. H. Judge Keyser Q.C.:

Introduction

1. The claimant, Mr Dodson, was the owner of Waen Wen Fishery ("the Fishery") at Glasinfryn, Bangor. The Fishery was adjacent to the River Cegin (in Welsh, Afon Cegin), which discharges into the Menai Strait at Port Penrhyn to the east of Bangor. Between 2004 and 2008 the Fishery stocked carp. But by the end of 2008 the stock had virtually disappeared.
2. It is the claimant's case that the stock was lost by reason of otter predation and that the defendant was responsible for that predation, because it had engaged in a scheme of enhancement of the habitat for otters in the Cegin basin. In these proceedings he claims from the defendant damages for the losses suffered by the Fishery, of the order of £2m.
3. On 5 April 2012 H.H. Judge Seys Llewellyn Q.C. ordered the trial of preliminary issues concerning the existence of the common law and statutory duties that the claimant says the defendant owed him and, if such duties are found to have existed, the breach of those duties. This is my judgment upon the trial of those preliminary issues. I must make clear that the hearing before me and the contents of this judgment do not address the question whether the claimant is correct in his contention that his stock was lost by reason of otter predation. The defendant says that he is incorrect in that contention.
4. The claimant represented himself at the trial and did so with great courtesy. I was also greatly assisted by the written and oral submissions of Mr Louis Browne, counsel for the defendant.
5. For the reasons appearing later in this judgment, I determine the preliminary issues against the claimant and the claim will be dismissed.

The preliminary issues

6. The preliminary issues for my determination are as follows:
 - (1) Whether the defendant owed to the claimant a duty of care at law of the scope and extent contended for at paragraphs 13, 23, 24 and 25 of the particulars of claim and/or pursuant to section 13 of the Environment Act 1995;
 - (2) In respect of any such duty as is found to have existed, whether the defendant was in breach of that duty.
7. It is necessary to set out the terms of paragraphs 13, 23, 24 and 25 of the particulars of claim, together with paragraph 12, which provides the factual grounds of the

allegations. For ease of reading, I have slightly adjusted the word order in some of the paragraphs.

"12. Between approximately September 2003 and the summer of 2005, the defendant was heavily involved in the clean-up of the Cegin basin with a view to the reintroduction of otters to the area. The river was cleaned and otter holts were constructed, with a view to increasing both the range of otters and the number of otters the river could support.

13. The defendant did not inform the claimant about this work or recommend to him that it would be wise to take precautions to protect the Fishery from otter predation as a result of its habitat enhancement works. The claimant was not made aware, despite his status as a riparian owner whose business could be put at risk by such measures, that the defendant intended to carry out these works or that the otter population in the Cegin basin was being encouraged by the defendant.

23. By virtue of the claimant's status as a riparian landowner, the claimant's registration of the Fishery as a CEFAS registered fish farm and the defendant's involvement in fish movements to and from the Fishery, the defendant owed the claimant a common law duty of care to inform the claimant of any activities that the defendant undertook which adversely affected, or could adversely affect, the fish stocks at the Fishery.

24. In the premises, pursuant to the aforesaid duty, the defendant should have informed the claimant that it was carrying out habitat enhancements to the River Cegin and was otherwise encouraging the otter population in the areas directly surrounding the Fishery.

25. In breach of the aforesaid duty, the defendant failed to warn the claimant of the increased risk of otter predation to the Fishery's fish stocks either to any sufficient extent or at all."

8. I do not at this stage need to set out the provisions of section 13 of the Environment Act 1995 ("the 1995 Act"). As the hearing proceeded, so the way in which the claimant put his case became clearer. Indeed, at my request, he and Mr Browne had a discussion with a view to clarifying the basis of the alleged duty, and I was told the results of that discussion. They accord with the understanding I had already gained. The claimant, quite rightly, does not suggest that section 13 gave rise to a statutory duty to give to him advice concerning the need to take preventive measures against otter predation on the River Cegin. Rather, his case is to the following effect:

(1) In the normal course, the defendant would have been under no duty to give to the claimant such advice.

(2) Nor would the defendant have come under such a duty by reason of the general works it undertook to clean up the river in the period 2003 -2005. The claimant made clear that he had no issue with the generality of those works.

(3) However, in one specific respect the defendant acted in such a way as to come under a duty to give such advice. This respect was the construction, or supervision of the construction, of 2 otter holts on the river. The reasons why this activity gave rise to a duty to advise were as follows:

(i) The construction of otter holts amounts to the positive enhancement of the environment for colonisation of otters.

(ii) The defendant had no power to act for the purpose of enhancing the environment for that purpose.

(iii) Any such activity would have required both (a) a statutory instrument to permit the defendant to carry out such works and (b) Environmental Impact Assessment under either the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 or the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999.

(iv) The construction of the otter holts created a reasonably foreseeable risk of harm to the claimant by reason of an increase in the otter population in the vicinity.

9. I ought to say something briefly about this last point. One question that might have arisen for consideration, if this claim had proceeded, is whether the construction of the otter holts (of which I shall say more presently) had any causal relevance to loss of the claimant's fish stock. The defendant says firmly that it had no such relevance. That question is not before me; I am concerned only with the preliminary issues. However, the question of what consequences might reasonably have been foreseeable as likely to result from the defendant's activity is of relevance to the question whether that activity gave rise to a duty to give to the claimant advice about the need to take preventive measures against otter predation. To take an extreme (and fanciful) example: if the defendant had unlawfully erected on the river bank a political placard, it could hardly be suggested that that would have given rise to a duty to give advice about otter predation. Only if it were foreseeable that the activity in question might materially increase the risk of otter predation could the activity be relevant to the alleged duty to advise.

The facts in more detail

10. The claimant purchased the land at Glasinfryn in 1999. His original intention was to develop it as a nature reserve and public fishery but, being unable to obtain the necessary permissions, he subsequently decided instead to develop it as a fish farm. To that end he engaged the services of Dr Bruno Broughton as a fishery consultant, and the Fishery was established in accordance with Dr Broughton's advice.
11. The site is conveniently described in auction particulars from September 2008, when the claimant was trying to sell it. It comprised about 17.6 acres and contained 6 clay-lined fishing lakes, constructed with bunded walls and contoured bottoms, filled with a mixture of still water and spring water.
12. In accordance with Dr Broughton's advice, the claimant erected anti-bird netting over the lakes at the Fishery. Correspondence from the Countryside Council for Wales to the local planning authority in July 1999, commenting on the claimant's original planning application, remarked on "the need to consider the issue of predator control (otters, herons, cormorants, saw-billed ducks)". However, no steps were taken to guard against predation by otters. I shall say something about the reasons for that omission later in this judgment.

13. At all events, the lakes were stocked and the Fishery became fully operative. The defendant's documents show that in May 2004 22,500 small carp were stocked in the pools. Subsequently, between December 2004 and May 2005, the defendant issued 14 consents for the netting and removal of fish from the pools, and around 14,000 carp were removed.
14. After the sales in the spring of 2005, the claimant attempted to sell the Fishery; he says that health problems were making it increasingly difficult for him to run the Fishery. Eventually he placed it in auction; I have already referred to the particulars from September 2008. But the Fishery did not sell at auction.
15. The claimant accordingly decided to net and sell a proportion of the fish that remained in his lakes, in order to defray the auction costs. However, his evidence is that, when the lakes were netted, no fish were found. In January 2009 the largest lake was drained; again, no fish were found. The fish stocks had been entirely depleted.
16. The claimant's case is that (1) the fish stocks were destroyed by otter predation, (2) the otter predation was the result of increases in the otter population on the River Cegin and (3) that population increase was the result of unlawful activity by the defendant in actively improving the habitat for otters during the period 2003 - 2005. It is therefore necessary to consider what it was that the defendant did during that period.

The river and the works

17. The evidence before me shows that the River Cegin has at all material times been, for the most part, a clean and unspoilt river. A *River water quality report* produced by Mr Huw Jones, who is employed by the defendant as a Team Leader Technical (Biodiversity), shows that, with only one exception, the defendant's monitoring of the river during the period 1993 to 2009 has always shown biological and chemical water quality scores of "very good" or "good", where "very good" indicates a result similar to that expected for an unpolluted river and "good" indicates a result a little short of an unpolluted river. The one exception was the result for the lower Cegin in 2000, which gave a biological water quality score of "fairly good" (indicating worse than expected for an unpolluted river); however, the chemical water quality score was "very good" or "good", and by the time of the next monitoring of the biological water quality in 2002 the result was "very good". I accept Mr Jones' evidence that the river is well wooded, with riparian woodland along much of its length, and is very rural, presenting a high-quality habitat for wildlife, including fish and otters.
18. However, the River Cegin was not without its problems. The west bank of its upper reaches is close to the Maesgeirchyn housing estate on the edge of Bangor, and about 2 km of its 8 km length had been badly affected by antisocial behaviour; in particular, it had been the site of decades of fly-tipping, and an area near the river had been frequented by drug-users and had become a no-go area for many local residents. In addition, the Llandegai Industrial Estate borders the east bank of the River Cegin and, although the quality of the water in the river was good, there had been minor discharges into the river and there was a risk of pollution from discharges in the future.

19. In the context of these issues, in 2003 the defendant took the initiative in a project called the Llandegai-Maesgeirchen Environmental Sustainability Project Communities Project ("the Project"). The Project was in the nature of a partnership between the defendant, the local authority, Communities First, Keep Wales Tidy, the Maesgeirchen Action Group, North Wales Police, Cwmni Gwastraff Mon Ac Arfon, and various businesses from Llandegai Industrial Estate. Its primary objectives were set out in a written proposal produced by the defendant:

"The major aims of this campaign are to visit and audit all businesses to improve environmental performance (taking requisite enforcement action where necessary) and improve awareness, ensuring better environmental performance and social engagement by all businesses on the estate. In the long term the aim is to establish a community/business partnership group which will take an ongoing responsibility for their environment taken as a whole.

This initiative driven by Environment Agency Wales is unique as a collaborative project in both location and aims, as it encompasses all areas of the environmental spectrum. These outcomes can only be achieved by a concerted and consistent effort by all stakeholders, who commit to taking responsibility for their environment in a sustainable manner."

The proposal identified a number of specific aims. As well as prevention of illegal discharges and steps to put an end to fly-tipping, these aims included the following:

"3. Set up various stakeholder groups to drive different aspects of the project forward with the aim of ensuring the local domestic and business community take ownership of their environment to ensure that the project can be self sustaining in the long term.

4. Organise a series of follow up river cleans, to ensure that the river gets progressively cleaner, leading to a sustainable solution where stakeholder groups ensure continuing progress. This ensures a slow reduction of Agency involvement as the community gradually takes the lead, so that resources can be targeted elsewhere.

10. Initiate a bio-diversity and habitat improvement programme, that will enhance the whole valley and expand the current riparian strip. Public access and pathways could also fall into this improvement programme.

11. Establish a Junior Warden Scheme, which will involve local youngsters setting up a scheme through communities first, ... to enable them to take a full part in the community ownership of this area.

12. Hold education sessions for some of the disaffected young people from the estate Improving education and awareness among this group can help to turn potentially the biggest problem into the biggest asset."

20. In support of his case, the claimant refers to one specific activity undertaken as part of the Project, namely the construction of two otter holts. The claimant was unable to give or to produce any evidence as to which partner in the Project was responsible for the construction of the otter holts or as to the manner of their construction.

21. The defendant adduced evidence from Mr Anthony Roberts, one of its Senior Environment Officers, who co-ordinated the Project. I accept his evidence, which is uncontradicted. Mr Roberts said that he had learned of the construction of the otter holts from Mr Paul Hockaday, the Communities First Co-ordinator for the Marchog Ward of the County of Gwynedd, who in that capacity had been closely involved in the Project. So far as Mr Roberts was aware, the otter holts were flimsy constructions made by local children in an attempt to encourage them to take responsibility for their community and environment. He said that the defendant had neither built nor supervised the building of the otter holts and had nothing to do with them: the Project was a huge undertaking, and the otter holts were no more than "a fringe element to engage the kids". The concluding passages of Mr Roberts' witness statement are in the following terms:

"As part of the whole project, some minor initiatives were undertaken to promote community engagement, which included a tree-planting programme near the Maesgeirchen Estate, seeding open bare areas with wildflower seed mix, planting hedges, placing large boulders to prevent future fly-tipping, and the construction of 2 otter holts/lie-ups.

The 2 otter holts/lie-ups were surface constructions which were a community-based initiative that involved some of the local youngsters and were a very small part of the programme and certainly never one of its major aims. The area where they were constructed contains a great deal of more suitable habitat for otters to lie up in or to establish holts, as it contains an excellent riparian habitat of tree roots and undercut river banks.

The construction of these structures was made somewhat academic as they were washed away by a severe flood in 2004."

22. The final sentence of that passage from Mr Roberts' statement is addressed primarily to causation, with which I am not concerned. However, it also provides some confirmation of Mr Roberts' evidence as to the nature of the construction of the holts.

The defendant

23. The defendant was established by the 1995 Act, which by section 2 transferred to it many functions, including those of the National Rivers Authority.

24. The principal aim of the defendant is set out in section 4 (1) of the 1995 Act:

"It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development mentioned in subsection (3) below."

That contribution is expressed by subsection (3) to be "the contribution which, having regard to the Agency's responsibilities and resources, the Ministers consider it appropriate for the Agency to make, by the discharge of its functions, towards attaining the objective of achieving sustainable development." The concept of

sustainable development is not susceptible of precise definition. In the United Kingdom, the relevant strategy was set out in *A Better Quality of Life: A strategy for sustainable development in the UK* (May 1999). The concept is, in governmental language, to do with achieving a better quality of life for present and future generations, having regard to certain key objectives: social progress that recognises the needs of everyone; effective protection of the environment; prudent use of natural resources; and maintenance of high and stable levels of economic growth and employment. Guidance under section 4 was given in Wales by *The Environment Agency's Objectives and Contribution to Sustainable Development in Wales: Statutory Guidance from the National Assembly for Wales* and in England by a corresponding document published by the Secretary of State for the Department of Environment, Food and Rural Affairs. These documents did not dictate the manner of performance of the defendant's specific duties but dealt with policy at a general level. They did however make it clear that an objective of the performance of the defendant's conservation duties would be to help in conserving and enhancing the diversity of native wildlife habitats and to contribute to the implementation of the Biodiversity Action Plans that are referred to below.

25. The *Management Statement issued to the Environment Agency*, published jointly by the Secretary of State for Environment, Food and Rural Affairs and the Welsh Assembly Government in July 2002, stated at paragraph 2.2:

"The Agency's principal functions and duties may be categorised as follows:

- Flood Defence ...
- Water Resources ...
- Water Quality: To preserve and improve the quality of rivers, estuaries, coastal waters and groundwaters, through pollution control powers and the regulation of discharge consents, and to monitor sewage treatment works and trade discharges. Also to monitor the quality of freshwater, groundwater and tidal waters (up to three miles from the coast).
- Waste Management...
- Process Industry Regulation ...
- Fisheries: To maintain and improve salmon, trout, freshwater and eel fisheries, to regulate these and to inform DEFRA and the Assembly Government of outbreaks of notifiable fish disease.
- Radioactive Substances ...
- Land Contamination ...
- Navigation ...
- Recreation ...
- Conservation: To conserve and enhance the water environment, including areas of natural beauty or environmental sensitivity and to encourage biodiversity."

26. Paragraph 2.8 of the *Management Statement* provided:

"2.8 In pursuit of its objectives the Agency will need to work closely with a wide range of partners in the public, private and voluntary sectors. An

inclusive approach will be important in ensuring that the Agency is responsive to the views and policies of those with whom it deals, that it can receive and give advice, and that relative responsibilities are well understood and properly co-ordinated. In some cases a memorandum of understanding with another body may be useful."

27. Among the other specific provisions of the 1995 Act, mention may be made of section 6 (1) and section 7 (1). Section 6 (1) provides:

"It shall be the duty of the Agency, to such extent as it considers desirable, generally to promote -

- (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters;
- (b) the conservation of flora and fauna which are dependent on an aquatic environment...

This subsection is without prejudice to the duties of the Agency under section 7 below."

Section 7 (1) provides:

"(1) It shall be the duty of each of the Ministers and of the Agency, in formulating or considering -

- (a) any proposals relating to any functions of the Agency other than its pollution control functions, so far as may be consistent-
 - (i) with the purposes of any enactment relating to the functions of the Agency
 - (ii) in the case of each of the Ministers, with the objective of achieving sustainable development
 - (iii) in the case of the Agency, with any guidance under section 4 above
 - (iv) in the case of the Secretary of State, with his duties under section 2 of the Water Industry Act 1991,

so to exercise any power conferred to him or it with respect to the proposals as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest;

- (b) any proposals relating to pollution control functions of the Agency, to have regard to the desirability of conserving and enhancing of natural beauty and of conserving flora, fauna and geological or physiographical features of special interest;

- (c) any proposal relating to any functions of the Agency -

- (i) to have regard to the desirability of protecting and conserving building, sites and objects of archaeological, architectural, engineering or historic interest;

(ii) to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects; and
(iii) to have regard to any effect which the proposals would have on the economic and social well-being of local communities in rural areas."

28. Section 37 (1) of the 1995 Act provides that the defendant may do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions. Section 37 (3) gives to the defendant the power, but does not impose on it the duty, to provide to any person in the United Kingdom advice or assistance, including training facilities, as respects any matter in which the defendant has skill or experience.
29. Section 13 of the 1995 Act, which is identified in the preliminary issues, imposes on the defendant a duty to establish and consult advisory committees in respect of the discharge of its functions. The advice envisaged is advice to be sought by the defendant and given to it by specialist advisors. It has nothing to do with a duty to advise members of the public. The claimant no longer relies on it in support of his claim, other than as a part of the general legislative framework.

Otters and the defendant

30. Otter numbers have increased naturally throughout Britain following a major decline in numbers between the 1950s and the 1970s. Some of this increase of numbers has taken place naturally in consequence of improved environmental conditions. But it is in part due to deliberate efforts at re-colonisation, pursuant to both Community and domestic legislation.
31. Otters are listed under Annexes II and IV of the Habitats Directive (Council Directive 92/43/EEC). The primary objective of the Habitats Directive is the maintenance or restoration, at favourable conservation status, of the natural habitats and species of wild fauna and flora of Community interest. Article 2 provides:

"1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

According to Article 1(a) of the Directive, "conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."

32. Otters were given protection in domestic law under the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats etc) Regulations 1994. Since 2006 biodiversity in the United Kingdom has been furthered by sections 41 and 42 of the Natural Environment and Rural Communities Act 2005. Those provisions build on the earlier UK Biodiversity Action Plans, by which the conservation obligations upon the United Kingdom were given effect; among these was the *Otter Biodiversity Action Plan*, for which the defendant was the joint lead partner with the Wildlife Trusts. The objectives and targets of the Otter Biodiversity Action Plan included:

"4.1 Maintain and expand existing otter populations.

4.2 By 2010, restore breeding otters to all catchments and coastal areas where they have been recorded since 1960."

Among the tasks specifically given to the defendant under the Biodiversity Action Plan were:

"5.2.1 Seek to include action for otters in Catchment Management Plans for all rivers containing otter populations by 2005, including 'otter havens' in relevant areas.

5.2.3 Produce catchment based local habitat management plans identifying key areas for restoration and enhancement."

33. The evidence of Mr Huw Jones, which I accept, is that in the period 1999 to 2002, the Countryside Council for Wales undertook the process of securing designation of four sites in North Wales as Special Areas of Conservation for otters and as Special Sites of Scientific Interest. The River Cegin was not included in those sites. However, North West Wales has been a stronghold of otter populations over a long period of time, and otters have remained present in the vicinity of the River Cegin. In April 2004, at the time when the claimant was about to stock the Fishery, the defendant published *Otter Survey of Wales 2002*, which was based on data gathered in 2002. The Summary stated:

"Of the 1097 sites surveyed, 71% had signs of otter. If only the 1008 sites common to all previous surveys are compared, then 74% of sites were positive. This compares with 20% in 1977/8, 38% in 1984/5 and 53% in 1991. The overall percentage increase in positive records between 1991 and 2002 was 41%. The results exceed the UK Otter Biodiversity Action Plan target of 65% of positive sites in the Wales national survey by 2002 and also the 70% target for 2010. The results also exceed the rate of recovery predicted by Strachan & Jefferies (1996). Otter signs were found in all 16 hydrometric areas, including Anglesey, which previously had no signs in the surveys of 1984/5 and 1991. The hydrometric areas with the highest proportion of positive sites were the Cleddau, Teifi and Wye. The areas with the lowest proportion of positive sites were Mid Glamorgan, Anglesey and Taff. The greatest percentage increases in positive sites since 1977/8 were on the Conwy (3% to 90% of sites positive) and the Clwyd (from 4% to 96%). The greatest increase since 1991 was in Mid Glamorgan (from 2% to 21%). The 2002 survey confirms the continuing recovery of the otter population in Wales and demonstrates the value of the national surveys in monitoring long-term

changes. It also provides an opportunity to recommend future actions to continue the expansion to other parts of Wales."

Table 2 in the Survey showed that in the Glaslyn hydrometric area, which was the relevant area for the Fishery, the data gathered in 2002 demonstrated a very marked increase in the "positive sites" (that is, sites where otters had been shown to be present) when compared with the data from the last previous survey in 1991.

34. Two other documents published by the defendant, both of them in 1999, should be mentioned.

35. *Otter Predation: is my fishery at risk* was a leaflet aimed at informing owners of fisheries and fish farms and those considering setting up new fisheries about the issues relating to possible otter predation. Page 1 contained a map showing the distribution of otters in England and Wales in 1998; it showed otters as "present" in North West Wales and as "common" in the middle and eastern parts of North Wales. Page 3 contained the following passages:

"How great is the risk?"

Fish farms and ponds lacking suitable protection can present otters and other predators with an easy and abundant food supply. In particular, large carp in ponds, gravel pits and lakes represent an easy source of food for otters. ...

Given the rate of recovery, it is likely that by the year 2010 there will be a risk of otter predation throughout England and Wales, except the most urban parts of river catchments. The level of risk will vary, but will be greatest where fisheries and fish farms have been established near wetland habitats, especially if breeding females are close by.

What should I do?

In situations where fish losses to otters are particularly high, or are likely to be a serious problem, steps should be taken to prevent otters gaining access to the fish, whilst still allowing otters to travel freely along watercourses. Before any steps are taken to stop predation, the identity of the culprit should be established. If losses are due to mink, for example, live cage trapping should be used, which allows other animals, including otters, to be released.

If otters **are** thought to be the culprit, there are several measures that could be taken, for example fencing and developing a small decoy pond close to the river or stream, stocked with low value fish and with easy access for otters. Variations in site conditions and the behaviour of individual otters mean there are no 'hard and fast' rules. Permanent fencing is an option which is known to work."

How do I get advice?

If you currently have a fishery or are considering setting up a new one, there **are** measures you can take to prevent fish losses to otters, but each fishery will have its own specific issues. It is essential that you contact your local otter advisor if you:

- suspect predation by otters;

- intend to protect the site to avoid predation by otters;
- are planning to establish a new fishery."

36. *Otters and River Habitat Management* (2nd edition) was a comprehensive handbook. Paragraph 5.9.3, headed "Otters and Stillwater fisheries", was in these terms:

"The return of otters after a period of 20 or 30 years absence has the potential to cause problems at fish farms and Stillwater fisheries established in the intervening period. In situations where fish losses to otters are particularly high, or are likely to be a serious problem, steps should be taken to prevent otters gaining access to the fish, whilst still allowing otters to travel freely along rivers and streams. Before any steps are taken to stop predation, identifying the culprit should be the first action. If otters are thought to be the culprit, there are several measures that could be taken, for example fencing and developing a small decoy pond close to the river or stream, stocked with low value fish and with easy access for otters. Variations in site conditions and the behaviour of individual otters mean there are no 'hard and fast' rules, although permanent fencing is an option that is known to work.

Further guidance is provided in a leaflet available from the Environment Agency (*Otter Predation: is my fishery at risk?*, Environment Agency, 1999) and site-specific advice is available from trained otter specialists from the local Wildlife Trusts Otters and River Project Officers and from the Otter Trust."

Discussion of the preliminary issues

37. The claimant no longer relies on breach of a statutory duty said to have been owed to him. Section 13 of the 1995 Act does not assist him, and he does not point to any other statutory provision that imposes a duty on the defendant that is actionable in damages. I shall simply add that, having considered the 1995 Act, I am satisfied that the duties it imposes on the defendant are in the nature of public duties. It is not arguable that Parliament intended that breach of any of the defendant's duties under the 1995 Act should be actionable by an individual harmed by that breach. Further, and regardless of whether any duty under the 1995 Act is actionable by an individual, no case has been advanced that the defendant was in breach of any duty under the 1995 Act.
38. Accordingly, the first preliminary issue (paragraph 7, above) is whether the defendant owed to the claimant a duty of care at common law to advise him that its habitat enhancement activities gave rise to a risk of harm to his property and/or financial interests and to a need for him to take measures to protect those interests. The matters relied on in respect of such a duty are set out in paragraphs 12,13, 23, 24 and 25 of the particulars of claim.
39. Further, as I have already mentioned, the claimant made very clear in the course of the hearing that he did not suggest that the duty to advise arose by reason of the general clean-up of the River Cegin as part of the Project; he repeatedly confirmed that it was his case that the duty arose by reason of the defendant's involvement in the construction of the otter holts: see paragraph 8, above. It was also his case that that

involvement was unlawful in that the defendant was acting outside its statutory powers.

40. I shall address this last point first. Even if it be assumed that the defendant had relevant involvement in the construction of the otter holts (an assumption that I shall turn to later in this judgment), I reject the submission that the defendant was acting outside its statutory powers. The claimant contended that the general duty in section 6 (1) (b) of the 1995 Act to promote the conservation of flora and fauna which are dependent on an aquatic environment was inconsistent with a power to do anything to improve the aquatic environment of such flora and fauna. He appeared to believe that a duty to conserve otters implied the absence of a power to do anything, or even a duty to do nothing, that might tend to increase their population. That is to take far too narrow a view - indeed, an impossible view - of conservation. It would require the maintenance of a status quo, neither permitting the otter population to grow nor allowing it to fall. The concept of wildlife conservation is clearly much broader than this. The definition of conservation in Article 1(a) of the Habitats Directive (paragraph 31 above) reflects normal usage of the word in this context and is consistent with the governmental guidance given to the defendant in respect of the discharge of its functions and with the role given to the defendant in respect of the implementation of the Biodiversity Action Plans.
41. The claimant also submitted that the defendant had circumvented the public consultation and scrutiny that would have resulted from Environmental Impact Assessment ("EIA") before the otter holts were constructed or from the designation of the River Cegin as a Special Area of Conservation or a Special Site of Scientific Interest. As to EIA, the claimant's submissions lack both reality and a statutory basis. He referred to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 as being provisions that gave rise to a requirement for EIA. However, he was unable to explain how either set of regulations could have applied to the construction of the two otter holts, so as to impose a requirement of EIA, and in my judgment it is plain that neither did so. Indeed, the idea that EIA was required before the construction of two otter holts of the nature of those actually constructed is plainly fanciful. As regards statutory designation, the claimant's submission proceeded on the basis that the duty under section 6 (1) of the 1995 Act did not permit any improvement of the aquatic environment of the fauna to be conserved. As I have indicated, that basis is wrong. There is no requirement of statutory designation of a site as a Special Area of Conservation or a Special Site of Scientific Interest before enhancement of the aquatic environment can be carried out under section 6 (1).
42. I turn to the alleged duty of care.
43. Although he has not put it in quite these terms, the claimant's case amounts to a contention that, by reason of its involvement in the construction of the otter holts, the defendant came under a duty to exercise its power to advise him under section 37 (3) of the 1995 Act and that its failure to exercise that power gave rise to an individual right of action.

44. The question of when the existence of a statutory power gave rise to a common law duty of care was considered by the House of Lords in *Stovin v Wise* [\[1996\] A.C. 923](#). The decision of the majority of the Judicial Committee was explained in the speech of Lord Hoffmann; for present purposes it will suffice to refer to the summary in the headnote:

"[T]hat the question of whether the existence of a statutory power gave rise to a common law duty of care required an examination of the policy of the statute; that the absence of a statutory duty would normally exclude the existence of a common law duty of care; and that, accordingly, the minimum preconditions for basing a duty of care on a statutory power were, first, that it would have been irrational not to have exercised the power so that there was in effect a public law duty to act, and, secondly, that there were exceptional grounds for holding that the policy of the statute required compensation to be paid to persons who suffered loss because the power was not exercised."

45. Reference to "the minimum preconditions" in the decision in *Stovin v Wise* reflects the fact that Lord Hoffmann expressly reserved judgment on the question - unnecessary for determination in that case - whether a common law duty could *ever* be based on failure to exercise a statutory power. The House of Lords returned to that question in *Gorringe v Calderdale Metropolitan Borough Council* [\[2004\] UKHL 15](#), [\[2004\] 1 W.L.R. 1057](#). At paragraph 32, Lord Hoffmann said:

"Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."

Clerk & Lindsell on Torts (20th edition, 2010) summarises the position at 14- 48:

"It is now doubtful whether an irrational failure to exercise a power can ever give rise to a common law duty of care."

46. However, in *Gorringe* the House of Lords recognised that specific facts *other than the mere failure to exercise a power* might give rise to a duty of care. At paragraph 38 Lord Hoffmann said this:

"My Lords, I must make it clear that this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the National Health Service Act 1977, but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but

whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it. The law in this respect has been well established since *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App Cas 430."

47. Unless the case could be brought within the principles mentioned in paragraph 38 of Lord Hoffmann's speech in *Gorringe*, the mere failure to exercise the statutory power clearly would not ground a common law duty in the present case, *even if* satisfaction of the minimum conditions identified in *Stovin v Wise* were capable of grounding a common law duty of care. First, a failure to advise a specific landowner could not be characterised as "irrational" in its public law sense of being so unreasonable that no reasonable body could have failed to exercise the power, particularly when publications on the prevalence of otters and on otter predation had been made publicly available. Second, the policy of the Act is clearly not directed to matters of private economic interest but rather to public welfare. That is clear from the nature of the specific duties in the Act. It is also clear from the material parts of the Introductory Text to the 1995 Act:

"An Act to provide for the establishment of a body corporate to be known as the Environment Agency; to provide for the transfer of functions, property, rights and liability to those bodies, and for the conferring of other functions on them... to make further provision for the control of pollution, the conservation of natural resources and the conservation or enhancement of the environment...."

That is the context in which the power to advise must be seen.

48. However, the claimant rightly does not attempt to rely solely on the nonexercise of the statutory power to advise in order to ground a common law duty of care. He contends that this is one of the "cases in which public authorities have actually done acts ... which give rise to a common law duty of care", as mentioned by Lord Hoffmann in *Gorringe*. I have already set out the acts on which the claimant relies.
49. The circumstances in which a duty of care will be held to exist at common law were considered by the House of Lords in *Caparo Industries Plc v Dickman* [\[1990\] 2 A.C. 605](#). Two passages from the speeches will sufficiently indicate the approach taken by the House. At 617-618 Lord Bridge of Harwich said:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

At 618 Lord Oliver said:

".... it is difficult to resist the conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the

same thing, for in some cases the degree of foreseeability is such that it is from that alone the requisite proximity can be deduced, whilst in others the absence of the essential relationship can most rationally be attributed simply to the Court's view that it would not be fair and reasonable to hold the Defendant responsible."

50. In my judgment, the construction of the otter holts on the River Cegin did not impose on the defendant any duty of care at common law to advise the claimant in respect of otter predation and the protection of his own economic and proprietary interests. My reasons are as follows.

(1) The claimant's case falls at the first hurdle. I find that the defendant neither constructed the otter holts nor advised in respect of their construction nor supervised their construction. It was accordingly not responsible for their construction. The evidence on this point has been set out above. The claimant contends that the defendant was, at the least, responsible for the construction of the otter holts because it was the lead partner in the Project. I reject that contention. Many bodies, groups and organisations took part in this wide-ranging collaborative Project and all had particular interests and responsibilities. The construction of the otter holts was a community-based activity, at the fringes of the Project and arranged by other persons than the defendant.

(2) A further insurmountable obstacle to the claimant's case arises from the nature and utility of the holts; this point is not entirely unrelated to the first, though it is a distinct point. As I mentioned in paragraph 9 above, only if it were foreseeable that the activity in question might materially increase the risk of otter predation could the activity be relevant to the alleged duty to advise the claimant. The evidence before me, which I accept, is clearly to the effect that it was not foreseeable that the construction of the two otter holts might materially increase the risk of otter predation. The evidence from the defendant's witnesses of fact was to the effect that the banks of the River Cegin in the vicinity of the two artificial holts provided plenty of more suitable sites for otters to colonise. More importantly, I heard expert evidence from Dr Paul Chanin, an ecological consultant with expertise in otters. The relevant parts of his written evidence appear from the following extracts from pages 17 and 18 of his report dated 29 June 2012:

"Habitat 'enhancements' carried out on the Afon Cegin and elsewhere, whatever their intention, do not have any impact on the recolonisation by otters except where the food supply is increased or the levels of toxic pollutants is decreased which was not the case here.

The spread of otters within the Glaslyn Hydrometric area, including Afon Cegin, is the result of natural processes not re-introductions.

No actions taken by the Environment Agency Wales or by Community First are likely to have influenced recolonisation of the Afon Cegin by otters."

In oral evidence, in answer to questions by me, Dr Chanin reiterated his opinion that the construction of the otter holts in the course of the Project would have done no real harm but would have achieved no reasonably

foreseeable benefit other, possibly, than for the local (human) community. The removal of toxic chemicals from the water or the increase of the productivity of the food supply might have encouraged re-colonisation by otters if it had been undertaken; but as neither of those activities was undertaken, the Project would not have been likely to make any difference to the local otter population. This conclusion, which I accept, would, in a different context, be relevant to questions of causation. However, for reasons that I have explained, it undermines the attempt to use the construction of the otter holts as the basis of a duty of care at common law.

(3) Within the terms of the test in *Caparo*, accordingly, I do not consider that the primary requirement of foreseeability of damage is satisfied. Of course, it may well have been foreseeable that the claimant might be affected by otter predation. But that, if so, was nothing to do with the Project or the construction of otter holts. It was to do with the foreseeable presence of otters in the vicinity of the River Cegin and the presence of attractive fish supplies in the Fishery.

(4) Further, there was no relationship of proximity between the claimant and the defendant. The claimant had neither asked for nor received personal advice from the defendant. The only "relationship" between them was such as existed by reason of the defendant's performance of its statutory functions. In my judgment, that did not suffice to ground a relationship of neighbourhood, such as would be required for the existence of a duty of care.

(5) Apart from all of the foregoing matters, it would in my judgment plainly not be "fair, just and reasonable" to impose a common law duty of care on the defendant in the circumstances of this case, in the light of the following considerations.

(6) First, considerable weight is to be attached to the fact that the 1995 Act does not impose any obligation on the defendant to exercise the power to advise in consequence of the exercise of any of its other statutory powers or duties; nor does it create any right in any individual to sue the defendant for the exercise of its powers or duties.

(7) Second, it is a significant part of the defendant's statutory function to improve the environment and thereby to further the conservation of, among other fauna, protected species such as the otter. The defendant's functions in connection with the UK Biodiversity Action Plan in particular involve the requirement to perform activities that are liable to increase the otter population. A duty of care such as the claimant contends for would be liable to conflict with, or at the least create a tension with, the performance of these duties. The importance of this point should not be obscured by focussing on the particular circumstances of this claimant. If the claimant is correct, the defendant will be faced with the possibility that its legitimate actions in respect of environmental improvement will have to be accompanied by a specific - as opposed to a general - consideration of the private proprietary and financial interests that will or might be affected by those legitimate actions. The prospective identification of the economic interests involved and assessment of the degree of risk that arises and the appropriate response to that risk would clearly be both difficult and onerous. It is one thing to acknowledge that sustainable development involves a balance between competing interests

at the level of policy and strategy; see above. It is quite another to require specific examination of individual interests at the level of implementation, particularly where (a) the statutory scheme does not require this and (b) such a requirement would have significant implications regarding the deployment of the defendant's resources.

(8) Third, it would not, anyway, be fair, just or reasonable to impose a specific duty to advise, in circumstances where (a) the owner of a Fishery located near a river can reasonably be expected to take appropriate steps to inform himself as to his own interests and the risks faced by his business, and (b) the defendant had disseminated to the public at large information that was adequate for that purpose. I have mentioned the publications earlier in this judgment and I shall say a little more about them in paragraph 53 below.

51. For these reasons, I decide the first preliminary issue (duty) against the claimant, and the second preliminary issue (breach) does not fall for consideration.
52. It would be artificial to discuss in detail how I would have determined the second preliminary issue if I had found for the claimant on the first preliminary issue: all would have depended on the scope of the duty of care found to exist. Clearly, if the defendant had been under a duty to give to the claimant advice about the specific works carried out at the River Cegin, it would have been in breach of such a duty: no such advice was given.
53. However, the facts as set out above make it clear in my judgment that, even if any common law duty of care could have been identified with even the slightest plausibility, the defendant would have complied with it. One need only consider the publication *Otter Predation: is my fishery at risk*. Any person owning or considering setting up a fishery would without difficulty have been able to obtain this leaflet. It made clear that the otter population had increased and was increasing and it showed that otters were present in North West Wales. It would be for the individual fishery-owner to take specific advice from such source as he chose and to take such precautions as he decided to take after receiving advice. But it could hardly be suggested that the defendant had failed to put into the public domain the basic relevant information.
54. As I understood his evidence, the claimant had indeed seen *Otter Predation: is my fishery at risk* before he stocked his Fishery, and maybe before he set it up. He says that he decided he was not at risk of otter predation for a combination of reasons: first, the advice he received from Dr Broughton did not alert him to the need to protect against that risk; second, he understood from persons with local knowledge that no otters had been seen on the River Cegin for many years; third, he considered the river to be too polluted to support an otter population. As to the first point, Dr Broughton was not called to give evidence in this case and the advice he gave is not a matter for determination by me. Clearly, however, the correct course was for the claimant to take specialist advice, as he purports to have done. As to the second point, the precise nature of the reports given to the claimant is unclear. But the defendant was not responsible for what local residents known to the claimant told him. And the fact, if it were such, that otters had not been seen in the vicinity in recent years would not demonstrate that no steps to protect against otter predation ought reasonably to be taken, particularly having regard to the evidence in *Otter Predation: is my fishery at*

risk that the otter population was increasing. As to the third point, in accepting the evidence of the defendant's witnesses, I reject the claimant's portrayal of the River Cegin as polluted and an unattractive environment for fish and otters. Although part of the river was disfigured by fly-tipping, the quality of the water and the attractiveness of the habitat to wildlife were consistently good over a period of at least several years before the Fishery was stocked.

55. On the evidence before me I cannot say and do not know why the claimant took no steps to guard against otter predation. Nor is it necessary for the purposes of this judgment to make any finding in that regard. It might, however, be noted that evidence in the case, not previously referred to in this judgment, shows that the potential expense of permanent fencing at fisheries was a matter of concern in certain quarters by the time the Fishery was stocked in 2004.
56. I should again emphasise that this judgment and the hearing that preceded it have been concerned with the preliminary issues of duty and breach alone. The defendant has throughout this case denied that otter predation is a plausible explanation of the loss of the claimant's fish stock. I have not been required to determine that issue. Even on the information before me, however, it is clear that the claimant would have faced considerable difficulties in establishing that the loss of his stock was due to otter predation.

Conclusion

57. For the reasons set out above, I decide on the first preliminary issue that the defendant did not owe to the claimant the duties of care alleged in the particulars of claim. Accordingly, the second preliminary issue does not arise for determination.